STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-18-24

THE COMMITTEE FOR RANKED-CHOICE VOTING, LUCAS ST. CLAIR, JIM BOYLE, MARK DION, MARK EVES, SEAN FAIRCLOTH, DIANE RUSSELL, BETSY SWEET, and BEN CHIPMAN

Plaintiffs,

v.

MATTHEW DUNLAP, as MAINE SECRETARY OF STATE

Defendant.

ORDER ON PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

I. Background

a. The Ranked-Choice Voting Act

On November 8, 2016, by a vote of 388,273 to 356,621, the people of Maine voted to enact legislation titled "An Act to Establish Ranked-Choice Voting" (the "Ranked-Choice Voting Act") which would "allow voters to rank their choices of candidates in elections for U.S. Senate, Congress, Governor, State Senate, and State Representative, and to have ballots counted at the state level in multiple rounds in which last-place candidates are eliminated until a candidate wins by majority." Maine Ballot Question 5, November 8, 2016. Pursuant to this successful citizens' initiative, the law took effect on January 7, 2017, however, it would not apply to elections until after January 1, 2018.

The Ranked-Choice Voting Act added 21-A M.R.S. § 1(27-C), which stated:

27-C. Office elected by ranked-choice voting. "Office elected by ranked-choice voting" means any of the following offices: United States Senator, United States Representative to Congress, Governor, State Senator and State Representative, and includes any nominations by primary election to such offices.

21-A M.R.S. § 1(27-C) (2015). The Ranked-Choice Voting Act also added Section 723-A, which laid out the process for determining the result of an election by ranked-choice voting:

§723-A. DETERMINATION OF WINNER IN ELECTION FOR AN OFFICE ELECTED BY RANKED-CHOICE VOTING

1. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Batch elimination" means the simultaneous defeat of multiple candidates for whom it is mathematically impossible to be elected.

B. "Continuing ballot" means a ballot that is not an exhausted ballot.

C. "Continuing candidate" means a candidate who has not been defeated.

D. "Exhausted ballot" means a ballot that does not rank any continuing candidate, contains an overvote at the highest continuing ranking or contains 2 or more sequential skipped rankings before its highest continuing ranking.

E. "Highest continuing ranking" means the highest ranking on a voter's ballot for a continuing candidate.

F. "Last-place candidate" means the candidate with the fewest votes in a round of the ranked-choice voting tabulation.

G. "Mathematically impossible to be elected," with respect to a candidate, means either:

(1) The candidate cannot be elected because the candidate's vote total in a round of the ranked-choice voting tabulation plus all votes that could possibly be transferred to the candidate in future rounds from candidates with fewer votes or an equal number of votes would not be enough to surpass the candidate with the next-higher vote total in the round; or

(2) The candidate has a lower vote total than a candidate described in subparagraph (1).

H. "Overvote" means a circumstance in which a voter has ranked more than one candidate at the same ranking.

I. "Ranking" means the number assigned on a ballot by a voter to a candidate to express the voter's preference for that candidate. Ranking number one is the highest ranking, ranking number 2 is the next-highest ranking and so on.

J. "Round" means an instance of the sequence of voting tabulation steps established in subsection 2.

K. "Skipped ranking" means a circumstance in which a voter has left a ranking blank and ranks a candidate at a subsequent ranking.

2. Procedures. Except as provided in subsections 3 and 4, the following procedures are used to determine the winner in an election for an office elected by

ranked-choice voting. Tabulation must proceed in rounds. In each round, the number of votes for each continuing candidate must be counted. Each continuing ballot counts as one vote for its highest-ranked continuing candidate for that round. Exhausted ballots are not counted for any continuing candidate. The round then ends with one of the following 2 potential outcomes.

A. If there are 2 or fewer continuing candidates, the candidate with the most votes is declared the winner of the election.

B. If there are more than 2 continuing candidates, the last-place candidate is defeated and a new round begins.

3. Ties. A tie under this section between candidates for the most votes in the final round or a tie between last-place candidates in any round must be decided by lot, and the candidate chosen by lot is defeated. The result of the tie resolution must be recorded and reused in the event of a recount. Election officials may resolve prospective ties between candidates before the election.

4. Modification of ranked-choice voting ballot and tabulation. Modification of a ranked-choice voting ballot and tabulation is permitted in accordance with the following.

A. The number of allowable rankings may be limited to no fewer than 6.

B. Two or more candidates may be defeated simultaneously by batch elimination in any round of tabulation.

5. Effect on rights of political parties. For all statutory and constitutional provisions in the State pertaining to the rights of political parties, the number of votes cast for a party's candidate for an office elected by ranked-choice voting is the number of votes credited to that candidate after the initial counting in the first round described in subsection 2.

6. Application. This section applies to elections held on or after January 1, 2018.

21-A M.R.S § 723-A (2015).

At that time, no change was made by amendment or repeal to Section 723(1) which has been in effect since 1985 and reads as follows:

> **1. Primary election.** In a primary election, the person who receives a plurality of the votes cast for nomination to any office, as long as there is at least one vote cast for that office, is nominated for that office...

21-A M.R.S. § 723(1) (2015).

b. Opinion of the Justices

On February 2, 2017, following the success of the Citizen's Initiative, the Maine Senate certified three questions concerning the constitutionality of ranked-choice voting to the Maine Supreme Judicial Court. First, the Maine Senate asked the Court to provide an opinion as to

whether the Ranked-Choice Voting Act's requirement that the Secretary of State count the votes centrally conflicted with the Maine constitutional provisions requiring city and town officials to count, declare, and record votes in elections for Governor, State Senators and State Representatives. Second, the Senate asked the Court to provide an opinion as to whether the Ranked-Choice Voting Act violated Maine constitutional provisions stating that the State Representative, State Senator, or Governor be chosen "by a plurality of all votes returned." *See* Me. Const. art. IV, pt.s 1 § 5, 2 § 4, 1 § 3. Finally, the Senate asked the Court to provide an opinion as to whether the Ranked-Choice Voting Act's requirement that a tie in the final round of voting be decided by lot conflicts with the constitutional provision that a tie will be determined by the Maine Legislature.

With respect to the Senate's second question, in briefing and oral argument before the Supreme Judicial Court, the proponents of the Ranked-Choice Voting Act argued that ranked-choice voting as put forth in the Ranked-Choice Voting Act is a method for determining who obtained a plurality of the vote. Therefore, the proponents argued that there was no conflict between the plurality language found in the Maine Constitution and the method for determination of an election by ranked-choice voting as detailed in the Ranked-Choice Voting Act, Section 723-A.

In the opinion issued April 13, 2017, the Supreme Judicial Court of Maine, finding the second question presented by the Maine Senate to be an important question of law and a solemn occasion for which an advisory opinion was appropriate, opined that the Ranked-Choice Voting Act conflicted with the Maine Constitution. *Opinion of the Justices*, 2017 ME 100, ¶¶ 55, 68, 70, 162 A.3d 188. The Justices interpreted the Maine constitutional provisions concerning election by a plurality to mean that "[f]or Maine Senators, Maine Representatives, and the Governor

alike, an election is won by the candidate that first obtains 'a plurality of' all votes returned." *Id.* ¶ 64. The Justices opined that where one candidate for any of these offices gained more votes than any of his or her opponents in the initial tabulation of votes, regardless of whether or not that candidate had obtained a majority of the votes, the Maine Constitution stands for the proposition that he or she is the victor. *Id.* ¶ 65. The Maine Supreme Judicial Court considered the Ranked-Choice Voting Act to be inconsistent with the "plurality" language of the Maine Constitution because if a candidate obtains more votes than any of his or her opponents in the initial tabulation of votes but does not obtain a majority of the votes, the tabulation of votes would continue until someone achieved a majority. *Id.* ¶¶ 66-68. By this method, a candidate that "first obtains a plurality of all votes returned" may not win. *Id.* On that basis, the Justices of the Supreme Judicial Court offered their opinion that the Ranked-Choice Voting Act conflicts with the Maine Constitution.

c. An Act to Implement Ranked-Choice Voting in 2021

Having obtained the legal opinion of the Justices of the Supreme Judicial Court, the Legislature struggled to reconcile the intent of the citizens of Maine in voting to enact the Ranked-Choice Voting Act, the *Opinion of the Justices*, the Maine Constitution and the existing statutory structure. In June 2017, the Legislature considered both a full repeal of the Ranked-Choice Voting Act and a constitutional amendment process with no success. On October 23, 2017, during a special session, the Legislature passed "An Act to Implement Ranked-choice Voting in 2021." On November 4, 2017, the bill became law without the Governor's signature. The Act to Implement Ranked-choice Voting in 2021 delays the implementation of ranked-choice voting until December 1, 2021 unless, prior to that date, the voters of the State ratify an

amendment to the Constitution of Maine; and it indefinitely postpones implementation if the constitutional change is not made.

The Act to Implement Ranked-Choice Voting in 2021 both amended and added to the language of the Ranked-Choice Voting Act. It repealed Section 1(27-C) as created by the Ranked-Choice Voting Act and replaced it with:

> **27-C. Elections determined by ranked-choice voting.** "Elections determined by ranked-choice voting" means:
>
> A. Primary elections for the offices of United States Senator, United States Representative to Congress, Governor, State Senator and State Representative;
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> B. General and special elections for the offices of United States Senator and United States Representative to Congress; and
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> C. General and special elections for the offices of Governor, State Senator and State Representative.
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> This subsection is repealed December 1, 2021 unless, prior to that date, the voters of the State ratify an amendment to the Constitution of Maine, Article IV, Part First, Section 5, Article IV, Part Second, Sections 4 and 5 and Article V, Part First, Section 3 authorizing the Legislature, by proper enactment, to determine the method by which the Governor and members of the State Senate and House of Representatives are elected.

21-A M.R.S. § 1(27-C) (2017). The Act to Implement Ranked-Choice Voting in 2021 also made the following changes to the language of Section 723, which had previously stated that primaries would be determined by a plurality:

> **1. Primary election.** In a primary election held before December 1, 2021, the person who receives a plurality of the votes cast for nomination to any office, as long as there is at least one vote cast for that office, is nominated for that office, except for write-in candidates under paragraph A. In a primary election held on or after December 1, 2021, the person who is determined the winner pursuant to section 723-A for nomination to any office, as long as there is at least one vote cast for that office, is nominated for that office, except for write-in candidates under paragraph A.
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> ...
>
> **2. Other elections.** In any other election except for those determined by ranked-choice voting, the person who receives a plurality of the votes cast for election to any office, as long as there is at least one vote cast for that office, is elected to that office, except that a write-in candidate must also comply with section 722-A.

21-A M.R.S. § 723 (2017). Additionally, the Act to Implement Ranked-Choice Voting in 2021 amended the language of Section 723-A, which was created by the Ranked-Choice Voting Act, by adding language delaying implementation until December 1, 2021 and repealing ranked-choice voting if the Maine Constitution is not amended prior to that date:

> **6. Application.** This section applies to elections held on or after December 1, 2021.
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> **7. Contingent repeal.** This section is repealed December 1, 2021 unless, prior to that date, the voters of the State ratify an amendment to the Constitution of Maine, Article IV, Part First, Section 5, Article IV, Part Second, Sections 4 and 5 and Article V, Part First, Section 3 authorizing the Legislature, by proper enactment, to determine the method by which the Governor and members of the State Senate and House of Representatives are elected.

21-A M.R.S. § 723-A(6-7) (2017).[1] Read as a harmonious whole, the Act to Implement Ranked-Choice Voting in 2021 establishes by statute a process for ranked-choice voting if a constitutional amendment is passed, delays the implementation of ranked-choice voting for any election until the Constitution is amended, and effectively repeals ranked-choice voting if a constitutional amendment is not made by December 1, 2021.

d. People's Veto

Beginning October 27, 2017, the Plaintiffs in the current action, along with other proponents of ranked-choice voting, began the People's Veto process, by which they hoped to suspend the portions of the Act to Implement Ranked-Choice Voting in 2021 which delayed implementation of ranked-choice voting until December 1, 2021. After approval by the Secretary of State on November 6, 2017, signatures began to be collected. The People's Veto seeks to repeal all of the Act to Implement Ranked-Choice Voting in 2021 except the following language from Section 1(27-C):

[1] The cited provisions are not the only amendments made by the Act to Implement Ranked-Choice Voting in 2021.

27-C. Elections determined by ranked-choice voting. "Elections determined by ranked-choice voting" means:

A. Primary elections for the offices of United States Senator, United States Representative to Congress, Governor, State Senator and State Representative;

B. General and special elections for the offices of United States Senator and United States Representative to Congress;[1]

as well as some language added to section 21-A MRSA § 601 that is not at issue in this action. On March 5, 2018, the Elections Division of the Secretary of State's Office determined that there were enough signatures submitted for the People's Veto of An Act to Implement Ranked-Choice Voting in 2021 to appear on the June 12, 2018 ballot.

e. Current Statutory Language

As of March 5, 2018, the relevant language of the Act to Implement Ranked-Choice Voting in 2021 has been fully suspended except for the amended language of Section 1(27-C) specifying that primary elections for the offices of United States Senator, United States Representative to Congress, Governor, State Senator and State Representative are to be determined by ranked-choice voting, pending the June 12, 2018 vote on the People's Veto. This would suggest that on June 12, 2018, according to Section 1(27-C), the primary elections for Governor will be determined by ranked-choice voting. The process of ranked-choice voting, as detailed by Section 723-A of the Ranked-Choice Voting Act, would remain valid, but all amendments added to that section by the Act to Implement Ranked-Choice Voting in 2021 were suspended.[2]

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[1] The People's Veto would remove Section 1(27-C)(C) which stated that "General and special elections for the offices of Governor, State Senator and State Representative" were elections to be determined by ranked-choice voting.

[2] If the People's Veto is unsuccessful, the Act to Implement Ranked-choice Voting in 2021 will be "unsuspended" meaning no election will be determined by ranked-choice voting unless a constitutional amendment is passed.

However, Section 723(1) also remains on the books, unaffected by amendments made by the Act to Implement Ranked-Choice Voting in 2021. While Section 1(27-C) in conjunction with Section 723-A permits ranked-choice voting in primary elections and explains the process of determination, Section 723(1) still states that in primary elections, "the person who receives a plurality of the votes cast for nomination to any office, as long as there is at least one vote cast for that office, is nominated for that office." 21-A M.R.S. § 723(1). When read with the language of the *Opinion of the Justices* in mind, there is a conflict between the sections of the statute.

This conflict in the statutory scheme was brought to light by the Secretary of State last week on March 29, 2018 while preparing for a meeting with Legislative leadership and otherwise preparing for the June 12, 2018 primary election. Counsel for the Secretary of State alerted counsel for the Plaintiffs that day, and the parties conferred telephonically with the Court which was advised that the Plaintiffs intended to file this motion the following day. On March 30, 2018, Plaintiffs moved the Court to enter a temporary restraining order requiring the Secretary of State to continue the implementation of ranked-choice voting for the June 12, 2018 primary election.[4] Hearing was held on the Motion that same day, and the Court was informed at hearing that the Secretary of State would not oppose the entry of a temporary order requiring him to continue with implementation of ranked-choice voting for the June 12, 2018 gubernatorial primaries.

II. Standard of Review

[4] The Plaintiffs brought the current action on March 5, 2018, seeking declaratory judgment that the Ranked-Choice Voting Act governing primary elections and federal general elections is constitutional and must be carried out by the Secretary of State. Defendant filed an answer on March 19, 2018. The Court held a telephonic scheduling hearing after the filing of the Answer in which the Court questioned whether the Complaint pled a justiciable case or controversy. The Court took no further action and at the request of the parties set several telephone conferences over the next few weeks. In light of the Secretary of State's discovery and his statements to the Legislature, the Court is satisfied that the Plaintiff's Motion for Temporary Restraining Order presents the Court with a justiciable case or controversy. The Complaint predated the current controversy and at the March 30, 2018 hearing the Plaintiffs conveyed their intent to amend the pleadings accordingly.

In order for a temporary restraining order to be issued, the Court must find that the moving party has shown the following four criteria:

> (1) that plaintiff will suffer irreparable injury if the injunction is not granted, (2) that such injury outweighs any harm which granting the injunctive relief would inflict on the defendant, (3) that plaintiff has exhibited a likelihood of success on the merits (at most, a probability; at least, a substantial possibility), and (4) that the public interest will not be adversely affected by granting the injunction.

Ingraham v. University of Maine at Orono, 441 A.2d 691, 693 (Me. 1982); *Bangor Historic Track, Inc. v. Department of Agriculture*, 2003 ME 140, ¶ 9, 837 A.2d 129.

III. Discussion

Plaintiffs seek Court entry of a temporary restraining order requiring the Secretary of State to continue implementation of the ranked-choice voting system for the June 12, 2018 primary elections in accordance with 21-A M.R.S. § 1(27-C) and 21-A M.R.S. § 723-A. The Court looks to each element of preliminary injunctive relief in turn.

a. Irreparable harm

Plaintiffs allege that irreparable injury will occur if the Court does not issue the requested relief. Irreparable injury is found where there is no adequate remedy at law. *See Bangor Historic Track, Inc.*, 2003 ME 140, ¶ 10, 837 A.2d 129. As a result of the signatures collected in support of the People's Veto, it has been understood by candidates, officials, and the general public alike that the primary on June 12, 2018 will be decided by ranked-choice voting. Candidates have campaigned according to that understanding. Officials have begun the lengthy preparation for election day according to that understanding. The general public voted for just such a process in November 2016. To stop implementation now, ten weeks prior to election day, could cause the irreparable harm of not being able to implement the will of the voters by the June 12, 2018 election day. It could also irreparably injure candidates whose campaign strategy has been based

upon the method of determining outcome by ranked-choice voting. The Court finds that irreparable injury will occur if preliminary relief is not granted.

b. Balancing of Harms

In considering the issuance of a temporary restraining order, the Court must "balance plaintiff's risk of irreparable harm against any similar risk of irreparable harm which granting the injunction would create for defendant." *Mass. Audiology v. Whittier*, No. CV-15-186, 2015 Me. Super. LEXIS 108, *7 (June 11, 2015). In this case, the Court was informed that the Secretary of State was not certain as to his position on the motion, but was advised at oral argument that he does not now oppose entry of temporary relief; nor does he allege injury that would arise therefrom. Therefore, the Court finds that the potential harm to Plaintiffs if relief is not granted far outweighs any that would be caused to the Secretary of State by its entry.

a. Likelihood of Success on the Merits

Likelihood of success on the merits must be found in order for the Court to issue the requested relief. Plaintiffs claim that Section 723(1) was repealed by implication by Section 1(27-C) and Section 723-A. In *Lewiston Firefighters Asso., etc. v. Lewiston,* the Law Court explained that a statute may be repealed by implication "when a later statute covers the whole subject matter of an earlier statute or when an earlier statute is repugnant to or inconsistent with a later one" because it is a "reasonable inference that the legislature cannot be supposed to have intended that there should be two distinct enactments embracing the same subject matter in force at the same time." *Lewiston Firefighters Asso., etc. v. Lewiston*, 354 A.2d 154, 159-160 (Me. 1976). Therefore, the Law Court held that "the new statute, being the most recent expression of the legislative will, must be deemed a substitute for previous enactments, and the only one which is to be regarded as having the force of law." *Id.* The Law Court noted that it has "long

acknowledged the principle that repeals by implication are not favored and will not be upheld in doubtful cases." *Id.* at 159. The Plaintiffs argue that because Section 1(27-C) and Section 723-A are inconsistent with and wholly encompass the topics found in Section 723(1), Sections 1(27-C) and 723-A repeal Section 723(1) by implication.

Alternatively the Court may also look to general rules of statutory interpretation. "Our primary purpose in statutory interpretation is to give effect to the intent of the Legislature." *Arsenault v. Sec'y of State*, 2006 ME 111, ¶ 11, 905 A.2d 285. "The first step in statutory interpretation is to discern legislative intent from the plain meaning of the statute." *FPL Energy Me. Hydro LLC v. Dep't of Envtl. Prot.*, 2007 ME 97, ¶ 25, 926 A.2d 1197. However, where an ambiguity exists, the Court looks to "extrinsic sources like agency interpretation or legislative history to assist in interpreting ambiguous terms." *Competitive Energy Servs., LLC v. Pub. Utils. Comm'n*, 2003 ME 12, ¶ 15, 818 A.2d 1039. Additionally, where two statutes conflict, the Court follows these steps:

> First, to the extent that the two enactments cover the same subject-matter, those facets of either statute which treat the common subject-matter in the more direct, special and minute manner will usually be held to prevail. Second, the provisions of the later enactment which are consistent with the legislative purposes will generally control unless a contrary result is plainly required.

Opinion of Justices, 311 A.2d 103, 108 (Me. 1973).

The Court finds that, by both an implied repeal analysis and by a statutory interpretation analysis, the Plaintiffs have shown a likelihood of success on the merits. The Court finds that the newer Sections 1(27-C) and 723-A are inconsistent with Section 723(1) when plurality is interpreted according to the Justices of the Supreme Judicial Court's Advisory Opinion. Sections 1(27-C) and 723-A were enacted more recently than Section 723(1) and more directly and minutely deal with the process of election determination than Section 723(1). Additionally, there

is no question that the Ranked-Choice Voting Act, enacted by successful citizen's initiative, was drafted with the intent that the system of ranked-choice voting would be used to determine elections. The Court concludes that this is not "the doubtful case" envisioned by the Law Court in *Lewiston Firefighters*. Therefore, the Court finds that it is more likely than not that Plaintiffs will succeed on the merits of showing that the legislative intent of the people of Maine should be carried out by the implementation of ranked-choice voting in the June 12, 2018 primary elections for Governor.

b. Public interest

Finally, the Court must ascertain that the issuance of preliminary injunctive relief would not be contrary to the public interest. *Ingraham*, 441 A.2d at 693. In this case, it is with the interest of the public in mind that the Court orders entry of a temporary restraining order. The uncertainty that halting the ranked-choice voting implementation process at this late date would cause is significant. Clarity, stability and public confidence are essential to ensure the legitimacy of Maine elections.

IV. Conclusion

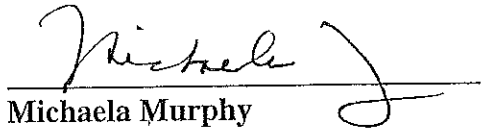
The Court finds that Plaintiffs are entitled to preliminary injunctive relief. Plaintiffs have shown irreparable injury, that injury to Plaintiffs outweighs any injury caused to Defendant by entry of preliminary relief, that Plaintiffs are more likely than not to succeed in showing that 21-A M.R.S. § 1(27-C) and 723-A have displaced 21-A M.R.S. § 723, and that preliminary relief is not contrary to the interest of the public.

The Motion for Temporary Restraining Order is GRANTED. The Court hereby orders the Secretary of State's Office to continue implementation of the system of ranked-choice voting

for the June 12, 2018 primary election in accordance with 21-A M.R.S. § 1(27-C) and 21-A M.R.S. § 723-A.

The Clerk is directed to incorporate this Order into the docket by reference in accordance with M.R. Civ. P. 79(a).

DATE: 4/3/18



Michaela Murphy
Justice, Superior Court